

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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***Ex parte*** RICK C. WINFREE, ERIC L. ROSE, WILLIAM A. SAUNDERS,  
MICAH TSEHN, DONNIE W. HYATT SR., and DONNIE W. HYATT JR.

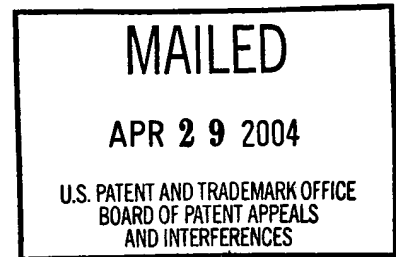
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Appeal No. 2001-2259  
Application No. 09/026,824

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ON BRIEF<sup>1</sup>

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Before HAIRSTON, FLEMING, and GROSS, ***Administrative Patent Judges.***

GROSS, ***Administrative Patent Judge.***

***DECISION ON APPEAL***

This is a decision on appeal from the examiner's final rejection of claims 1 through 3, 6, 7, 10, 11, 17, 18, 22 through 26, 44 through 47, and 55 through 63. Claims 4, 5, 8, 9, 13 through 16, 19 through 21, 27 through 30, 32 through 43, 48, 49, and 52 through 54 have been canceled. Claims 31, 50, 51, and 64 have been allowed. Claim 12 has been objected to as containing patentable subject matter but being dependent upon a rejected base claim.

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<sup>1</sup> We note that the hearing scheduled for September 17, 2002 was waived by appellants on September 12, 2002.

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Appellants' invention relates to a food preparation line with a U-shaped configuration, set up to allow fewer workers to assemble food products in a shorter period of time. Claim 1 is illustrative of the claimed invention, and it reads as follows:

1. A food preparation line comprising a first section, a second section lying generally normal to the first section, and a third section positioned next to and extending away from the second section at an angle and in the same general direction as the first section, a first inside corner being defined at a juncture between the first section and the second section, a second inside corner being defined at a juncture of the second section and the third section, a heated storage compartment positioned on the first section, a cooled storage compartment positioned on the second section, a heating device being positioned on the first inside corner and a generally open package storage compartment located near an end of the third section, which end is distal of the second section, whereby packaging stored in the generally open package storage compartment are easily accessed.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Boyd et al. (Boyd)	4,974,500	Dec. 04, 1990
Tuhro et al. (Tuhro)	5,163,536	Nov. 17, 1992
Conlan et al. (Conlan)	5,573,082	Nov. 12, 1996

The prior art references relied upon by the Board in rejecting the appealed claims are:

Neill, Jr. (Neill)	4,245,720	Jan. 20, 1981
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Appellants' admitted prior art at page 1 of the specification.  
(AAPA)

Claims 1 through 3, 6, 7, 10, 17, 18, and 22 through 26 stand rejected under 35 U.S.C. § 103 as being unpatentable over Tuhro in view of Conlan.

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Claim 11 stands rejected under 35 U.S.C. § 103 as being unpatentable over Tuhro in view of Conlan and Baze.

Claims 44 through 47, and 55 through 63 stand rejected under 35 U.S.C. § 103 as being unpatentable over Tuhro in view of Conlan and Boyd.

Reference is made to the Examiner's Answer (Paper No. 17, mailed May 3, 2001) for the examiner's complete reasoning in support of the rejections, and to appellants' Brief (Paper No. 16, filed March 20, 2001) and Reply Brief (Paper No. 18, filed June 27, 2001) for the appellants' arguments thereagainst.

#### **OPINION**

We have carefully considered the claims, the applied prior art references, and the respective positions articulated by appellants and the examiner. As a consequence of our review, we will reverse the obviousness rejections of claims 1 through 3, 6, 7, 10, 11, 17, 18, 22 through 26, 44 through 47, and 55 through 63 and enter a new ground of rejection under 35 U.S.C. § 103 for claims 1 through 3, 6, 7, 10, 11, 17, 18, 44 through 47, 55 through 59, and 61 through 63 pursuant to 37 C.F.R. § 1.196(b).

Claim 1 is directed to a food preparation line with three sections, the first and third of which are in the same direction and connected by the second, which is perpendicular to the other two. In addition, claim 1 recites 1) a heated storage

compartment on the first section, 2) a cooled storage compartment on the second section, 3) a heating device on the inside corner formed between the first and second sections, and 4) an open package storage compartment at the far end of the third section.

Tuhro (in Figures 1 and 1A, for example) discloses a three section preparation line, wherein the second section is normal to the first and third sections. However, as recognized by the examiner (Final Rejection, page 3) the first and third sections extend in opposite directions rather than forming a U-shaped arrangement, like the claimed arrangement. The examiner (Final Rejection, page 3) turns to Conlan for a teaching to use a U-shaped arrangement, i.e., to reduce the number of people needed to prepare the food by moving the various elements within the reach of the food preparer. Further, as indicated by the examiner (Final Rejection, pages 2-3), Tuhro's preparation line includes 1) heated storage compartment 22 on the first section and 2) cooled storage compartment 24 on the second section, but lacks 3) a heating device on the first inside corner. (Tuhro does disclose (in column 12, line 65-column 13, line 3) that other elements that might be included in commercial food service equipment include ovens, deep fat fryers, griddles, and ranges, all of which are heating devices.) The examiner asserts (Final Rejection, page 3) that the particular arrangement of the claimed elements "would involve only obvious matters of design choice

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. . . in view of the design flexibility disclosed in col. 2, lines 19-32 of Tuhro." Finally, the examiner (Final Rejection, page 3) points to Tuhro's storage compartments 33, 71, 34, and 33 for the claimed 4) open package storage compartment, though only 30 and 33 are in the third section and Tuhro does not indicate what is stored in either compartment, 30 or 33.

Appellants assert (Brief, page 7) that "[t]he placement of . . . components recited in the claim is important for reasons expressed in the specification," i.e., "to allow rapid assembly of various food products that comprise a single order at a quick-service restaurant." Appellants argue (Brief, pages 7-8) that the general teaching of "design flexibility" in Tuhro, relied upon by the examiner, is insufficient to suggest the particular placement of the claimed components. Appellants also assert (Brief, page 8) that although Conlan teaches a U-shaped configuration, Conlan fails to suggest placing a heated storage compartment on a first section and a generally open package storage compartment near an end of a third section. Accordingly, appellants conclude that neither reference nor the combination teaches the claimed U-shaped configuration with a heated storage compartment on a first section.

The examiner's use of the phrase "obvious design choice" is misplaced, particularly in view of cases such as *In re Chu*, 66

F.3d 292, 36 USPQ2d 1089 (Fed. Cir. 1995) and *In re Gal*, 980 F.2d 717, 25 USPQ2d 1076 (Fed. Cir. 1992). "Design choice" is limited to aesthetics only, not to functions as recited in the claims. Nonetheless, the question remains as to whether the particular claimed arrangement would have been obvious to the skilled artisan. We agree with the examiner that the placement of the various components claimed by appellants would have been obvious in view of the teachings of Tuhro and Conlan.

Specifically, Tuhro teaches (column 4, lines 14-17) that a feature of the invention is "almost total flexibility in the selection, placement and movability of the various base-defining units of the lower level LL relative to the upper level counters UL...." Further, Tuhro teaches (column 8, lines 15-18) that "the functional requirements of certain food service equipment dictates that different countertop configurations are needed for different purposes." Tuhro also states (column 9, lines 37-41) that "the inside and outside corner units 23 and 23A may be utilized to turn the direction of the cafeteria line CL when necessary or desirable due to room size, traffic flow, service requirements or the like." Similarly, Conlan discloses (column 6, lines 15-17) that device 28 may be any number of different elements, "depending upon the configuration of the counter 12 and the type of menu items to be delivered," and (column 11, lines

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22-26) that efficiencies "evolve from its specific design to accommodate site configuration and customer traffic flow." Thus, both references suggest making the equipment modular so that the elements can be rearranged to make food preparation and customer traffic flow more efficient based on the particular foods being prepared and the space available for the equipment, so the particular arrangement would have been obvious to the skilled artisan. The level of the skilled artisan should not be underestimated. *See In re Sovish*, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985).

Appellants further contend (Brief, page 7) that Tuhro's component 71 "is a multi-compartment bin for organizing tableware" rather than the claimed open packaging storage compartment. As indicated *supra*, the examiner (Final Rejection, page 3) also points to storage compartments 33 and 30 as open package storage compartments. However, Tuhro does not indicate that any of the storage compartments are for packaging. Although Conlan (column 11, lines 60-63) alludes to packaging prepared foods, Conlan has no suggestion of an open packaging compartment at the end of the third section. Although the examiner recognizes (Answer, pages 4-5) that Tuhro fails to teach open package storage compartments, the examiner erroneously relies upon "intended use" to remedy this deficiency. Therefore, we cannot

sustain the obviousness rejection, as presented by the examiner, of claim 1 and its dependents, claims 2, 3, 6, 7, 10, 11<sup>2</sup>, 17, 18, and 22 through 26. However, see the new ground of rejection *infra*.

Regarding independent claim 44, appellants argue (Brief, page 9) that Tuhro fails to teach a U-shaped counter with a warmer about six feet from a heating device, both on the first portion, an accompaniments container on the second portion, and a packaging dispenser within six feet of the accompaniments container. Further, appellants assert that Conlan and Boyd's "single person manned arrangements" fail to teach or suggest the claimed configuration of components.

As indicated *supra*, Tuhro and Conlan together teach making the equipment modular so that the elements can be rearranged to optimize efficiency in food preparation and customer traffic flow based on the particular foods being prepared and the space available for the equipment. Therefore, the U-shape and the particular placements of the warmer, the heating device, and the accompaniments container (i.e., within an armspan of a worker) would have been obvious to the skilled artisan. However, since the references fail to teach or

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<sup>2</sup> We note that the rejection of claim 11 further includes Baze. However, appellants have not separately argued claim 11, and we find nothing in Baze that would cure the deficiency of the primary combination of Tuhro and Conlan. Therefore, we have grouped claim 11 with claim 1.



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suggest an open packaging compartment, as explained *supra*, we cannot sustain the obviousness rejection of claim 44 and its dependents, claims 45 through 47. Nonetheless, see the new ground of rejection *infra*.

Appellants' arguments for claim 55 (Brief, pages 9-10) are substantially the same as those discussed *supra*. In addition appellants assert (Brief, page 10) that Conlan's single person arrangement teaches away from a pair of stationed workers, as recited in the claim. We agree that Conlan suggests a single person arrangement for "greater economies" (see column 4, lines 9-11). However, the skilled artisan, particularly viewing Conlan with Tuhro, would have recognized that Conlan's teachings suggest more than merely a single person arrangement. The skilled artisan would have viewed Conlan as suggesting configuring components to optimize efficiency in food preparation and customer traffic flow based on the particular foods being prepared and the space available for the equipment. Accordingly, if the most efficient preparation called for two servers, the skilled artisan would have recognized that the configuration would need to accommodate two people working side-by-side. Again, the level of the skilled artisan should not be underestimated. *Id.* Nonetheless, as claim 44 also recites a packaging dispenser, which we

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have not found in Tuhro and Conlan, we cannot sustain the obviousness rejection of claim 55 and its dependents, claims 56 through 63.

However, see the new ground of rejection *infra*.

Appellants (Brief, pages 10-11) separately argue claims 22 through 26 and 60. Specifically, appellants argue that neither Tuhro nor Conlan teaches or suggests ingredient dispensers, as recited in claims 22 through 26 and 60. We agree. Accordingly, the rejections of claims 22 through 26 and 60 are further reversed for the lack of ingredient dispensers.

**REJECTION UNDER 37 C.F.R. § 1.196(b)**

Under the provisions of 37 C.F.R. § 1.196(b), we enter the following new ground of rejection against appellants' claims 1 through 3, 6, 7, 10, 11, 17, 18, 44 through 47, 55 through 59, and 61 through 63:

Claims 1 through 3, 6, 7, 10, 17, 18 are rejected under 35 U.S.C. § 103 as being unpatentable over Tuhro in view of Conlan, Neill, and AAPA. As explained *supra*, the combination of Tuhro and Conlan lacks only a teaching of open packaging containers at the end of the third section. However, Conlan (column 11, lines 60-63) alludes to packaging foods in stating that prepared foods "are wrapped and temporarily stored in racks 242." Neill teaches that fast food restaurants serve people who eat in the restaurant, people who place

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orders from their cars, and people who carry their food out of the restaurant, and that restaurants which do not accommodate all three types of customers forfeit a portion of their potential business. Further, AAPA (page 1, lines 15-17) states that "[a]t the serving end, the end food product can be readied for serving or packaged for take-out or delivery orders." Tuhro teaches open compartments at the beginning of the line for forks, knives, and spoons (for customers eating in the restaurant), but makes no reference to packaging for take-out. It would have been obvious in view of Neill, Conlan, and AAPA to provide packaging materials at the serving end for packaging foods for take-out. Therefore, claims 1 through 3, 6, 7, 10, 17, and 18 would have been obvious over Tuhro in view of Conlan, Neill, and AAPA.

Claim 11 is rejected under 35 U.S.C. § 103 as being unpatentable over Tuhro in view of Conlan, Neill, and AAPA, as applied to claims 1 through 3, 6, 7, 10, 17, 18 above, and further in view of Baze.

It would have been obvious to add a taco rail as taught by Baze (and not separately argued by appellants) on the second section and extending along at least a portion of a length of the produce bin for the reasons given by the examiner at page 4 of the Final Rejection.

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Accordingly, claim 11 would have been obvious over Tuhro in view of Conlan, Neill, AAPA, and Baze.

Claims 44 through 47, 55 through 59, and 61 through 63 are rejected under 35 U.S.C. § 103 as being unpatentable over Tuhro in view of Conlan, Neill, and AAPA, as applied to claims 1 through 3, 6, 7, 10, 17, 18 above, and further in view of Boyd. As indicated *supra*, the combination of Tuhro, Conlan, and Boyd lacks only a teaching of open packaging containers at the end of the third section. We have found *supra* that it would have been obvious in view of Neill, Conlan, and AAPA to provide packaging materials at the serving end for packaging foods for take-out. Therefore, claims 44 through 47, 55 through 59, and 61 through 63 would have been obvious over Tuhro in view of Conlan, Boyd, Neill, and AAPA.

#### **CONCLUSION**

The decision of the examiner rejecting claims 1 through 3, 6, 7, 10, 11, 17, 18, 22 through 26, 44 through 47, and 55 through 63 under 35 U.S.C. § 103 is reversed. A new ground of rejection of claims 1 through 3, 6, 7, 10, 11, 17, 18, 44 through 47, 55 through 59, and 61 through 63 under 35 U.S.C. § 103 has been added pursuant to provisions of 37 C.F.R. § 1.196(b).

This decision contains a new ground of rejection pursuant to 37

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C.F.R. § 1.196(b) (amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53,131, 53,197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. & Trademark Office 63, 122 (Oct. 21, 1997)).

37 C.F.R. § 1.196(b) provides that, "A new ground of rejection shall not be considered final for purposes of judicial review."

37 C.F.R. § 1.196(b) also provides that the appellant, ***WITHIN TWO MONTHS FROM THE DATE OF THE DECISION***, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (§ 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner. . . .


(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. . . .

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

**REVERSED**  
**37 C.F.R. § 1.196(b)**

  
KENNETH W. HAIRSTON  
Administrative Patent Judge

  
MICHAEL R. FLEMING  
Administrative Patent Judge

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*Anita Pellman Gross*  
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